ORIGINAL

(2)

96-1683

No. [redacted]

RECEIVED
MAY 16 1997
OFFICE OF THE CLERK
SUPREME COURT, U.S.

Supreme Court, U.S.
FILED
MAY 16 1997
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

IN RE ARTHUR CALDERON, WARDEN, CALIFORNIA STATE PRISON AT SAN QUENTIN, Petitioner

ON PETITION FOR WRIT OF MANDAMUS

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

KAREN S. SCHRYVER
CALIFORNIA APPELLATE PROJECT
One Ecker Place, Suite 400
San Francisco, California 94105
(415) 495-0500

RICHARD C. NEUHOFF*
600 Harrison Street, Suite 535
San Francisco, California 94107
(415) 543-0433

Counsel for Real Party in Interest
RODNEY GENE BEELER

* Counsel of Record

31pp

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

The real party in interest, Rodney G. Beeler, asks leave to file the attached brief in opposition without prepayment of costs and to proceed *in forma pauperis*.

Real party in interest has previously been granted leave to proceed *in forma pauperis* in the United States District Court for the Central District of California, *Beeler v. Calderon*, case no. CV 96-0606-RT, pursuant to 21 U.S.C. § 848(q). Real party in interest also proceeded without prepayment of costs in the United States Court of Appeals for the Ninth Circuit, *Calderon v. United States District Court*, case no. 97-70277, by analogy to F.R.A.P. rule 24(a).

Petitioner's declaration in support of this motion is attached hereto.

Dated: May 15, 1997

Respectfully submitted,

Richard Neuhoff

Richard C. Neuhoff
Counsel of Record (by K Schreyer)

No. 96-1683

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

IN RE ARTHUR CALDERON, WARDEN, CALIFORNIA STATE PRISON AT SAN QUENTIN, Petitioner

---

ON PETITION FOR WRIT OF MANDAMUS

DECLARATION IN SUPPORT OF MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

KAREN S. SCHRYVER
CALIFORNIA APPELLATE PROJECT
One Ecker Place, Suite 400
San Francisco, California 94105
(415) 495-0500

RICHARD C. NEUHOFF*
600 Harrison Street, Suite 535
San Francisco, California 94107
(415) 543-0433

Counsel for Real Party in Interest
RODNEY GENE BEELER

*Counsel of Record

DECLARATION IN SUPPORT OF MOTION
FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

I, Rodney Gene Beeler, am the Real Party in Interest in the above-entitled case. In support of my motion to proceed without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of this case or to give security therefor; and I believe I am entitled to redress.

I further swear that the responses I have made to the questions and instructions below relating to my ability to pay the cost of proceeding in this Court are true.

1. Are you presently employed? Yes ___. No _X_.

   a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

   b. If the answer is no, state the date of your last employment and the amount of salary or wages per month which you received.

   1/9/86, approximately $1,700 per month.

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other

sources? Yes ___. No X.

a. If the answer is yes, describe each source of income and state the amount received from each during the past twelve months.

3. Do you own any cash or have a checking or savings account? Yes X. No ___.

a. If the answer is yes, describe the property and state its approximate value.

San Quentin Prison Trust Account: $ 10.42.

5. List the persons who are dependent upon you for support and state your relationship to those persons.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on: May 15, 1997.

Rodney Gene Beeler

RODNEY GENE BEELER

No. 96-1683

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

IN RE ARTHUR CALDERON, WARDEN, CALIFORNIA STATE PRISON AT SAN QUENTIN, Petitioner

---

ON PETITION FOR WRIT OF MANDAMUS

REAL PARTY IN INTEREST'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF MANDAMUS

KAREN S. SCHRYVER
CALIFORNIA APPELLATE PROJECT
One Ecker Place, Suite 400
San Francisco, California 94105
(415) 495-0500

RICHARD C. NEUHOFF*
600 Harrison Street, Suite 535
San Francisco, California 94107
(415) 543-0433

Counsel for Real Party in Interest
RODNEY GENE BEELER

* Counsel of Record

TABLE OF CONTENTS

Table of Authorities . . . . . ii - iv

I. CASE BACKGROUND 4

II. FAR FROM BEING CLEARLY AND INDISPUTABLY WRONG, THE COURT OF APPEALS WAS CLEARLY CORRECT IN CONCLUDING THAT A DISTRICT COURT MAY EQUITABLY TOLL THE ONE-YEAR PERIOD OF LIMITATION SET FORTH IN 28 U.S.C. § 2244(d). 6

A. Petitioner Calderon's Interpretation of Newly Enacted Section 2244(d) Would Render The 1996 Act Internally Inconsistent. 10

B. Nothing in Lonchar v. Thomas Or United States v. Brockamp Supports Petitioner Calderon's Position That Section 2244(d) Is Inflexibly Jurisdictional. . . . 12

C. Petitioner Calderon Has Mischaracterized The Congressional Debates. 16

D. Petitioner Calderon's Petition Is Permeated With Unjustified Rhetoric. 20

III. CONCLUSION. 24

TABLE OF AUTHORITIES

CASES

American Pipe and Construction Co. v. Utah,
414 U.S. 538, 94 S. Ct. 756, 38 L. Ed. 2d 713 (1974) . . 8

Bankers Life & Casualty Co. v. Holland, 346 U.S. 379,
74 S. Ct. 145, 98 L. Ed. 106 (1953) 1

Bowen v. City of New York, 476 U.S. 467,
106 S. Ct. 2022, 90 L. Ed. 2d 462 (1986) 13, 21

Braun v. Sauerwien, 10 Wall. 218 (1870) 13, 21

Burnett v. New York Central R.R., 380 U.S. 424,
85 S. Ct. 1050, 13 L. Ed. 2d 941 (1965) 8

Calderon v. United States District Court,
___ F.3d ___, 1997 WL 197546 . . . . . Passim

Cannon v. University of Chicago, 441 U.S. 677,
99 S. Ct. 1946, 60 L. Ed. 2d 560 (1979) 13

Honda v. Clark, 386 U.S. 484,
87 S.Ct. 1188, 18 L. Ed. 2d 244 (1967) 13, 21

Irwin v. Department of Veterans Affairs, 498 U.S. 89,
111 S. Ct. 453, 112 L. Ed. 2d 435 (1990) . . 6, 8, 13, 16

Lampf v. Gilbertson, 501 U.S. 350,
111 S. Ct. 2773, 115 L. Ed. 2d 321 (1991) 6, 13

Lawrence v. Chater, 516 U.S. ___,
116 S. Ct. 604, 133 L. Ed. 2d 545 (1996) 16

Lindh v. Murphy, 96 F.3d 856 (7th Cir. 1996)
cert. granted 117 S. Ct. 726 (1996) 23

Lonchar v. Thomas, 517 U.S. ___,
116 S. Ct. 1293, 134 L. Ed. 2d 440 (1996) 12, 14

McFarland v. Scott, 512 U.S. 849,
114 S. Ct. 2568, 129 L. Ed. 2d 666 (1994) 4, 11

United States v. Brockamp, 519 U.S. ___,
117 S. Ct. 849, 136 L. Ed. 2d 818 (1997) . 12, 14, 15, 16

United States v. Duell, 172 U.S. 576,
19 S. Ct. 286, 43 L. Ed. 559 (1899) 1

United States v. Fadem, 519 U.S. ___,
117 S. Ct. 849, 136 L. Ed. 2d 818 (1997) 16

United States v. Locke, 471 U.S. 84,
105 S. Ct. 1785, 85 L. Ed. 2d 64 (1985) 6

William G. Tadlock Const. v. U.S. Dept. of Defense,
91 F.3d 1335 (9th Cir. 1996) 8

Zipes v. Trans World Airlines, Inc., 455 U.S. 385,
102 S. Ct. 1127, 71 L. Ed. 2d 234 (1982) 3, 7, 9

STATUTES

21 U.S.C. § 848(q)(4)(B) 10
21 U.S.C. § 848(q)(7) 11
28 U.S.C. § 2241 7
28 U.S.C. § 2244(d) . . . . . Passim
28 U.S.C. § 2254(d) 23
28 U.S.C. §§ 2261, et seq. 17
28 U.S.C. §§ 2263 18
28 U.S.C. §§ 2266 . . . . . 17, 18

OTHER AUTHORITIES

Antiterrorism and Effective Death Penalty Act of 1996 . . Passim
Antiterrorism and Effective Death Penalty Act of 1996 §107 17, 18
Antiterrorism and Effective Death Penalty Act of 1996 §108 . 11
Antiterrorism and Effective Death Penalty Act of 1996 §901 . 11

110 Cong. Rec. 12723 (1964) 9
110 Cong. Rec. 7243 (1964) 9
141 Cong. Rec. S7812-17 (June 7, 1995) 11
141 Cong. Rec. S7813 (June 7, 1995) 10, 11, 12
141 Cong. Rec. S7814 (June 7, 1995) 10, 11, 12
141 Cong. Rec. S7834 (June 7, 1995) 12
141 Cong. Rec. S7835 (June 7, 1995) 12

H.R. Conf. Rep. 104-518, at 111 (1996)
reprinted in 1996 U.S.C.C.A.N. 944 8

REAL PARTY IN INTEREST'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF MANDAMUS

A party seeking issuance by this Court of a writ of mandamus is required to show that his "right to issuance of the writ is 'clear and indisputable.'" Bankers Life & Casualty Co. v. Holland, 346 U.S. 379, 384, 74 S. Ct. 145,98 L. Ed. 106 (1953), quoting United States v. Duell, 172 U.S. 576, 582, 19 S. Ct. 286, 43 L. Ed. 559 (1899). That showing is far beyond what this writ petitioner can demonstrate. In fact, quite the opposite is true. For, in holding that the one-year period of limitation in newly enacted 28 U.S.C. § 2244(d) is subject to equitable tolling, the Court of Appeals -- and the District Court as well -- were plainly correct, both in reasoning and result. It is thus a vast understatement to say that petitioner Calderon's entitlement to issuance of the writ is not "'clear and indisputable.'"

Nevertheless, petitioner Calderon urges that section 2244(d)'s one-year period of limitation be given an illogical and extreme reading, one that will inevitably produce injustice of the worst sort. For, under petitioner Calderon's unyielding interpretation, the one-year period of limitation would be absolutely fixed for all cases and for all purposes, no matter how good the cause nor how compelling the reason for a longer

time. If counsel cannot be found for a capital prisoner within one year, or if counsel is appointed with insufficient time to meaningfully prepare, or if counsel dies or becomes sick, or quits, or is disbarred, it is the prisoner who is out of luck; he will have no federal habeas corpus review and can be executed forthwith, regardless of the unconstitutionality of his conviction or death sentence.

Similarly, since the one-year period of limitation applies to non-capital as well as capital prisoners, an uncounseled non-capital prisoner could, under petitioner Calderon's interpretation, be denied federal review simply because he or she failed to tender a timely in forma pauperis application, or because the petition was filed in the wrong court, or because the petition contained an easily remediable procedural deficiency. Indeed, a rogue prison official could unilaterally deny an inmate the opportunity for federal habeas review by refusing to mail the inmate's pro per petition or by tossing it into the trash.

In petitioner Calderon's view, the consequences of any and all such failures and malfeasances are to be visited upon the prisoner, despite the prisoner's total inability to do anything to prevent them.

Suffice it to say, there is absolutely nothing in the language or legislative history of the one-year period of limitation that supports petitioner Calderon's argument. To the contrary, as Judge Kozinski pointed out in his decision for the unanimous Court of Appeals in this case, "Every relevant signal -- from the Act's plain language, to its legislative history, to its structure -- points in the same direction: [§ 2244(d)'s] one-year timing provision is a statute of limitations subject to equitable tolling, not a jurisdictional bar." Calderon v. United States District Court, ___ F.3d ___, ___, 1997 WL 197546 *5.[1]

Petitioner Calderon objects to the Court of Appeals' holding but fails to answer most of the Court's reasoning or analysis. Indeed, petitioner does not even mention (let alone address) the primary decisions of this Court upon which the Court of Appeals relied, Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 102 S. Ct. 1127, 71 L. Ed. 2d 234 (1982). See, 1997 WL 197546 at *4. Instead, petitioner attempts to cast doubt upon the Court of

---

[1] Because the appendices to petitioner Calderon's petition for writ of mandamus are inaccurate in at least the numbering of the footnotes of the decisions of the Court of Appeals and the District Court, and because the appendices have no page numbers, real party in interest will refer to the Court of Appeals' decision by its WestLaw citation, 1997 WL 197546.

PUBLISHER'S NOTE:

THE FOLLOWING PAGE Is UNAVAILABLE FOR FILMING:

4

petitioner Calderon asserts (Pet. at 5), but was Mr. Beeler's primary attorney.[2]

Third: upon learning of primary counsel's decision to leave, Mr. Beeler's backup attorney (Ms. Schryver) began an immediate search to find another lawyer to serve as second counsel, while she herself, although "already bogged down in a number of other capital cases" (1997 WL 197546 at *1), was assigned by her office to take over former counsel's role as primary attorney. It was only later, after realizing that "much of the work product [that former lead counsel] left behind was not usable" (1997 WL 197546 at *6), that real party in interest requested equitable tolling.

---

[2] Petitioner Calderon appears to be determined to mischaracterize former counsel's role. The fact that Mr. Braden was primary counsel (and not second counsel) was mentioned more than a dozen times in the pleadings filed in the District Court in connection with the motion for equitable tolling. See, e.g., Motion to Extend Filing Date, etc. at 7:2, 7:4, 23:19, 24:7, 24:11, 24:13-14; Reply Memo at 1:26, 2:14, 15:22; Schryver Decl. at 1:26-27, 2:5-7; Neuhoff Decl. at 1:26-27, 2:2 (all of which were before the Court of Appeals).

Also, in response to petitioner Calderon's mandamus petition filed in the Ninth Circuit, real party specifically pointed out that Calderon was misstating former counsel's role. See Real Party in Interest's Response to Petition for Writ of Mandate and/or Prohibition (filed in Ninth Circuit) at 1 n.1. Notwithstanding being thus corrected, and notwithstanding that the Court of Appeals twice correctly portrayed former counsel's role, 1997 WL 197546 at *1 & *6, petitioner Calderon still persists in characterizing former counsel as "second counsel."

Fourth: when the District Court granted equitable tolling, it did not "set[] the filing date seven months beyond the April 23, 1997, period of limitations," as petitioner Calderon asserts. (Pet. at 13:4-5.) Rather, the District Court granted equitable tolling to October 13, 1997, or about five and one-half months after April 23, 1997. See 1996 WL 197546 at *1.

II. FAR FROM BEING CLEARLY AND INDISPUTABLY WRONG, THE COURT OF APPEALS WAS CLEARLY CORRECT IN CONCLUDING THAT A DISTRICT COURT MAY EQUITABLY TOLL THE ONE-YEAR PERIOD OF LIMITATION SET FORTH IN 28 U.S.C. § 2244(d).

The language of new section 2244(d) itself, the governing case law, and the historical context make it crystal clear that the one-year time period at issue here is subject to equitable tolling. The Court of Appeal's analysis of that question was so obviously correct that petitioner Calderon does not even attempt to address most of it. Among the uncontested points made by the Court of Appeals are the following:

1. "Statutes of limitations are presumptively subject to equitable tolling." 1997 WL 197546 at *5, citing Irwin v. Department of Veterans Affairs, 498 U.S. 89, 95-96, 111 S. Ct.453, 112 L. Ed. 2d 435 (1990), and United States v. Locke, 471 U.S. 84, 94 n.10, 105 S. Ct. 1785, 85 L. Ed. 2d 64 (1985); see also, e.g., Lampf v.

Gilbertson, 501 U.S. 350, 111 S. Ct. 2773, 115 L. Ed. 2d 321 (1991).

2. Newly enacted section 2244(d) "reads like an everyday, run-of-the-mill statute of limitations." 1997 WL 197546 at *6 n.4.

3. Newly enacted section 2244(d) "is phrased only as a 'period of limitation,' and 'does not speak in jurisdictional terms or refer in any way to the jurisdiction of the district courts.' Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 394 (1982). Nor does the jurisdictional provision of the habeas statute, 28 U.S.C. § 2241, 'limit jurisdiction to those cases in which there has been a timely filing' in the district court. Zipes, 455 U.S. at 393." 1997 WL 197546 at *4.[3]

4. "[B]oth the Supreme Court and this court have repeatedly held that timing provisions even more unyieldingly phrased than AEDPA's are statutes of

---

[3] Real party Beeler notes that these considerations are the bases upon which this Court found a statutory limitations period to authorize equitable tolling in Zipes, a decision that petitioner Calderon completely ignores, notwithstanding that it was central to the Court of Appeals' analysis.

limitations subject to tolling. See, e.g., Burnett v. New York Cent. R.R., 380 U.S. 424, 426, 85 S. Ct. 1050, 13 L. Ed. 2d 941 (1965) ("[N]o action shall be maintained ... unless commenced within three years from the day the cause of action accrued"); William G. Tadlock Const. v. United States Dept. of Defense, 91 F.3d 1335, 1340 (9th Cir. 1996) ('[C]omplaint may not be filed more than 180 days after the later of the date on which the violation is alleged to have occurred or was discovered.')" 1997 WL 197546 at *4.[4]

5. "AEDPA's legislative history, were it necessary to consult it, speaks with equally resounding clarity. Neither the conference report, see H.R. Conf. Rep. 104-518, at 111 (1996), reprinted in 1996 U.S.C.C.A.N. 944, nor any statements of individual House or Senate members, describe the one-year limitation as a

---

[4] If anything, the Court of Appeals understated its point, for it could also have pointed to such additional decisions as American Pipe and Construction Co. v. Utah, 414 U.S. 538, 94 S. Ct. 756, 38 L. Ed. 2d 713 (1974) ("Any action to enforce any cause of action [under the antitrust laws] shall be commenced within four years after the cause of action accrued") and Irwin v. Dept. of Veterans Affairs, 498 U.S. 89, 95, 111 S. Ct. 453, 112 L. Ed. 2d 435 (1990) ("Every claim ... shall be barred unless the petition ... is filed ... within six years") (dictum).

> restriction on federal court jurisdiction. Many members of Congress -- including AEDPA's authors in the Senate and its sponsors in the House -- did, however, describe section 101 as a 'statute of limitations.'" 1997 WL 197546 at *4.[5]

Petitioner Calderon does advance a number of arguments to this Court, most of which were fully answered by the Court of Appeals. In large measure, Calderon simply reiterates his rejected arguments without replying to the Court of Appeals' reasons for rejecting them. No point would be served by restating here what the Court of Appeals held. Real party in interest does, however, wish to make the following points in addition to those made by the Court of Appeals.

---

[5] Real party would add that in Zipes, this Court found that legislative authorization for equitable tolling was supported by the fact that one Senator had characterized the statutory limitation period at issue in that case as a "period of limitation" and another Senator had described the purpose of the provision as preventing the pressing of "stale" claims. Zipes, 455 U.S. at 394, citing 110 Cong. Rec. 12723 & 7243 (1964). In the present case, as the Court of Appeals made clear, the Congressional Record concerning section 2244(d) contains the same kinds of characterizations, except that here they are more numerous. Moreover, the fact that section 2244(d) used the very same "period of limitation" phrase that Zipes had indicated supported a finding of equitable tolling is yet further evidence that that statute embodied that doctrine.

A. Petitioner Calderon's Interpretation of Newly Enacted Section 2244(d) Would Render The 1996 Act Internally Inconsistent.

Petitioner Calderon's assertion that section 2244(d) embodies an "inflexible limitation on federal court jurisdiction" (1997 WL 197546 at *1) is even more implausible than the Court of Appeals' opinion indicates, because such an interpretation would render habeas law -- and Congress' actions in enacting the AEDPA -- internally inconsistent.

In enacting the 1996 Act, Congress did not alter a capital federal habeas petitioner's right to counsel. Indeed, as legislators debating the habeas amendments themselves noted, the right to counsel established in 21 U.S.C. § 848(q)(4)(B) is an integral part of the system of federal habeas review.[6] This discussion is particularly significant in light of the background against which it arose.

Before the AEDPA was enacted, this Court had found that "Congress' provision of a right to counsel under § 848(q)(4)(B) reflects a determination that quality legal representation is necessary in capital habeas corpus proceedings in light of `the seriousness of the possible penalty and the unique and complex

---

[6] See, e.g., 141 Cong. Rec. S7813 (Sen. Hatch), S7814 (Sen. Specter) (June 7, 1995).

nature of the litigation'" and that this right to counsel "necessarily includes a right for that counsel meaningfully to research and present a defendant's habeas claims." McFarland v. Scott, 114 S. Ct. at 2572 (quoting 21 U.S.C. § 848(q)(7)), 2573 (emphases added). In light of this background, it is significant that, during the process of enacting the 1996 Act, the Senate specifically rejected a proposed amendment to section 848(q) that would have eliminated the right to counsel in capital cases and instead made appointment of counsel entirely discretionary.[7] See 141 Cong. Rec. S7812-17 (June 7, 1995).

Congress' refusal to dilute the right to counsel in death penalty cases not only shows its continuing intent to provide habeas petitioners with counsel -- indeed, with counsel who are (in the words of McFarland) able "meaningfully to research and present a defendant's habeas claims" -- but it also undermines petitioner Calderon's claim that section 2244(d) is a rigid, inflexible jurisdictional prerequisite to filing. For, under respondent's view, section 2244(d) would effectively do away with the right to counsel if no attorney can be found within a year's

---

[7] "Technical amendments" were made to section 848(q) by sections 108 and 901 of the 1996 Act, but these amendments did not alter a capital petitioner's right to counsel in federal habeas proceedings.

time, or if counsel is found at a time where there is insufficient opportunity "meaningfully to research and present a defendant's habeas claims." Such a repeal by implication would be extremely doubtful in the best of cases, but here, where Congress specifically rejected an attempt to water down the right to counsel in capital cases and where its members extolled the importance of the assistance of counsel and insisted they were preserving the basic role of habeas corpus as a forum for protection of fundamental rights,[8] such a repeal is inconceivable.

B. Nothing in Lonchar v. Thomas Or United States v. Brockamp Supports Petitioner Calderon's Position That Section 2244(d) Is Inflexibly Jurisdictional.

Petitioner Calderon makes frequent reference to Lonchar v. Thomas, 517 U.S. ___, 116 S. Ct. 1293, 134 L. Ed. 2d 440 (1996), but the references amounts to nothing. Yes, of course, "federal courts **must** follow the legal principles embodied in the statutes, rules and precedents, and effectuate congressional intent where Congress has considered and resolved the issue." Pet. 13-14

---

[8] Throughout the debate over the 1996 Act, members of Congress emphasized that the habeas amendments were intended to preserve fairness to the habeas petitioner and the integrity of federal court review of state convictions. See, e.g., 141 Cong. Rec. S7814 & S7834 (1995) (Sen. Specter), id. at S7835 (Sen. Biden), id., at S7813 (Sen. Hatch).

(original emphasis). But the question before this Court is, what are the "legal principles" that are "embodied in the statute[]" in question (§ 2244(d))? A statute of limitations has long been held to "embody" (to use petitioner Calderon's word) the concept of equitable tolling.[9] So, when Congress invokes a statute of limitations in a new enactment, courts can and do reasonably presume that Congress has done so knowing what the statute-of-limitations concept "embodies" and that therefore Congress intends its enactment to "embody" equitable tolling unless it provides otherwise. See, e.g., Cannon v. University of Chicago, 441 U.S. 677, 698-99, 99 S. Ct. 1946, 60 L. Ed. 2d 560 (1979); Irwin, supra, 498 U.S. 89, Lampf v. Gilbertson, 501 U.S. 350, 111 S. Ct. 2773, 115 L. Ed. 2d 321 (1991). This is a particularly compelling conclusion in the present case, since section 2244(d) was enacted not long after Irwin clarified that statutes of limitations in general are presumptively subject to equitable tolling. Thus, as the District Court stated, "contrary to

---

[9] This Court has long found "'a traditional equitable tolling principle'" embodied in statutes of limitation. See, e.g., Bowen v. City of New York, 476 U.S. 467, 479, 106 S. Ct. 2022, 90 L. Ed. 2d 462 (1986), quoting Honda v. Clark, 386 U.S. 484, 501, 87 S. Ct. 1188, 18 L. Ed. 2d 244 (1967); Braun v. Sauerwien, 10 Wall. 218, 223 (1870) ("It seems, therefore, to be established, that the running of a statute of limitation may be suspended by causes not mentioned in the statute itself").

[petitioner Calderon's] assertions, applying the doctrine of equitable tolling to the one-year limitation period is not at all 'the type of ad hoc judicial exception-making expressly disapproved of in Lonchar.'" Pet. Appendix 2, §II.C. (penultimate sentence).

Another case to which petitioner alludes is United States v. Brockamp, 519 U.S. ___, 117 S. Ct. 849, 136 L. Ed. 2d 818 (1997). In Brockamp, this Court refused to apply the equitable tolling doctrine to section 6511 of the Internal Revenue Code of 1986 (which limits the time within which to make claims for tax refunds) because (1) section 6511's time limitations were set forth in an "unusually emphatic form" and in a "highly detailed technical manner," (2) the section reiterated its limitations several times in several different ways, (3) the section imposed substantive as well as procedural limitations by linking the amount of credit or refund recoverable to the time of filing, and (4) the section set forth very "specific" and "explicit" exceptions to its basic time limits (for refunds related to operating losses, credit carrybacks, foreign taxes, self-employment taxes, worthless securities, and bad debts), which exceptions did not include the grounds urged by the taxpayers as grounds for equitable tolling (i.e., senility and

alcoholism). "Section 6511's detail, its technical language, the iteration of the limitations in both procedural and substantive forms, and the explicit listing of exceptions, taken together, indicate to us that Congress did not intend courts to read other unmentioned, open-ended, 'equitable' exceptions into the statute that it wrote." Brockamp, 117 S. Ct. at 852 (emphasis added). This Court also noted that tax law is not normally characterized by case-specific exceptions reflecting individualized equities but that "occasional unfairness in individual cases" was the "price" that had to be paid "in order to maintain a more workable tax enforcement system." Id.

In the present case, the Court of Appeals found that Brockamp was not controlling because the factors upon which Brockamp relied are not present here. 1997 WL 197546 at *6 n.4. The Court specifically pointed out that (unlike section 6511 of the Internal Revenue Code) section 2244(d) "reads like an everyday, run-of-the-mill statute of limitations" and that "[w]hile ... 'occasional' injustices may be a necessary price of tax administration, they are decidedly not an acceptable cost of doing business in death penalty cases." Id.

Petitioner Calderon does not respond to either of these two points. And, instead of acknowledging that it was the

PUBLISHER'S NOTE:

THE FOLLOWING PAGE IS UNAVAILABLE FOR FILMING:

116

the Congressional Record support the claim that section 2244(d) is jurisdictional. Quoting statements by the Senatorial authors of the AEDPA's habeas provisions, petitioner Calderon asserts that "[i]t is clear that Congress was contemplating that capital habeas litigation would be completed in two years" and that, by allowing equitable tolling, "the District Court has delayed the **start** of the proceedings for nearly two years, instead of having the proceedings **conclude** within two years as contemplated by Congress." Pet. at 11-12 (original emphases).

Petitioner has mischaracterized the quoted Senators' remarks. The two-year period for "capital habeas litigation" alluded to by Senators Specter and Hatch has nothing whatsoever to do with the time limits in section 2244(d). Rather, the two-year period refers only to the special and separate provisions enacted by AEDPA for death penalty cases arising in states that have opted to provide certain specified procedures and resources to capitally convicted defendants. See AEDPA §107, adding Chapter 154 to Title 28, 28 U.S.C. §§ 2261-2266. This is apparent for at least two reasons.

First, the special provisions for capital cases from "opt in" jurisdictions ("Chapter 154 cases") include time limitations applicable to each stage of the processing of habeas corpus

petitions, from a (shorter) time to file an application, to other time limitations on the how long the district courts and the courts of appeals can take to handle various aspects of the case thereafter. See 28 U.S.C. §§ 2263, 2266. These beginning-to-end time parameters for "opt in" capital cases may make it "realistic and reasonable" (Senator Specter) for Congress to expect that "in most cases" (Senator Hatch) the federal habeas proceeding could be concluded in two years. However, for habeas cases not covered by the opt-in provisions (which includes real party's case, see Pet. at 12 n.3), the AEDPA enacted only one time limitation, the one-year statute of limitations in section 2244(d). Congress chose not to enact any other specific time constraints on the handling of such cases.

Thus, when petitioner Calderon quotes Senators Hatch and Specter talking about completing a federal death-penalty habeas case in two years, there is only one kind of proceeding to which they could have been referring, i.e., to proceedings conducted under newly enacted Chapter 154 for capital cases arising from qualifying opt-in jurisdictions. They could not have been referring to cases like Mr. Beeler's, which are handled under the

PUBLISHER'S NOTE:

THE FOLLOWING PAGE Is UNAVAILABLE FOR FILMING:

19

D. Petitioner Calderon's Petition Is Permeated With Unjustified Rhetoric.

Petitioner Calderon asserts that allowing section 2244(d)'s one-year period to be equitably tolled renders the one-year provision "a nullity" and will produce "the endless delay which compelled Congress to restrict the habeas jurisdiction in the first place." See Pet. at 9, 11. This is unjustifiable rhetoric. First of all, petitioner Calderon completely ignores the Court of Appeals' decision. "Equitable tolling." the Court stated, "will not be available in most cases, as extensions of time will only be granted if 'extraordinary circumstances' beyond

---

[12](...continued)
also lead to absurd results. A petitioner could (under § 2244(d)) take fully one-half of the two-year period simply to file his application, leaving just one year within which all of the following would normally have to occur: the state would investigate, prepare, and file its answer, the petitioner may file a traverse, the district court would rule on such matters as discovery and an evidentiary hearing and (possibly) would conduct an evidentiary hearing, the district court would thereafter decide the case, an appeal would be filed in the court of appeals, appellate briefs (opening, answering, and reply briefs) would be prepared and filed, oral argument would be held, a decision would rendered by the court of appeals, rehearing would be denied, and certiorari would be filed and denied.

There is not an iota of evidence that Congress intended the courts to adhere to such an unrealistically compressed process in cases where (unlike Chapter 154 cases) there can be no assurance the petitioner was provided any resources whatsoever in state court to identify and develop his constitutional claims.

a prisoner's control make it impossible to file a petition on time." 1997 WL 197546 at *5.

Second, equitable tolling does not "nullify" a statute of limitations or produce "endless delays." The Court of Appeals pointed out some of the fallacies in petitioner Calderon's argument, 1997 WL 197546 at *5, but there are others. For, equitable tolling has been a "traditional" principle applicable to federal statutes for well over one hundred years. See, e.g., Bowen v. City of New York, supra, 476 U.S. at 479; Honda v. Clark, supra, 386 U.S. at 501; Braun v. Sauerwien, supra, 10 Wall. at 223. Yet, as far as real party in interest can determine (and petitioner Calderon has pointed to nothing to the contrary), equitable tolling has never been found to have the kinds of untoward results predicted by petitioner Calderon.

Third, the doomsday prophesies of petitioner Calderon are particularly inappropriate in the habeas context, since there were no statutes of limitations applicable to habeas corpus petitions prior to the enactment of section 2244(d). Thus, none of the alleged "endless delays" about which Congress was supposedly concerned could in any way be attributed to equitable tolling. Now that a statute of limitations does exist, judges

will decide whether sufficient cause has been demonstrated to justify equitable tolling.

What petitioner Calderon is contending, in essence, is that federal district court judges cannot be trusted to exercise their equitable tolling discretion properly. There is no support for that contention. Calderon simply evinces a fundamental disrespect for the judiciary by suggesting that, even with judicial control over equitable tolling, habeas corpus cases will be filed no sooner than when there was no statute of limitations at all.

There is further unjustified rhetoric in Calderon's mandamus petition. For example, petitioner Calderon declares that the 1996 Act enacts "a highly deferential standard of review" of state court judgments; from this supposed premise, Calderon claims that "Congress has thus informed prospective habeas petitioners that only in the rarest cases can a viable claim form the basis for relief in the federal courts from the state court judgments" and that therefore "Congress intended a petitioner ... to present all claims with [sic] the required one-year period of limitation without exception." Pet. at 17.

No authority is cited in support of any of these points. Presumably, the first quoted clause refers to the Seventh

PUBLISHER'S NOTE:

THE FOLLOWING PAGE Is UNAVAILABLE FOR FILMING:

23

interpretation that is not embodied in the statute nor mentioned in the legislative history.[13]

III. CONCLUSION.

The Court of Appeals has merely held that section 2244(d) embodies the traditional principle of equitable tolling which is presumptively embodied, and has traditionally been embodied, in statutes of limitation, and which is in accord with "the Act's plain language, ... its legislative history, [and] its structure." 1997 WL 197546 at *5. The Court's conclusion is straightforward, simple, and unimpeachable.

Petitioner Calderon's petition to this Court ignores virtually everything the Court of Appeals wrote and proffers in

---

[13] The specious nature of petitioner Calderon's "deferential standard" syllogism is further exposed by the fact that Calderon's argument is completely dependent upon what statutory provision is chosen as the starting point. If the Court were to start from a different statutory premise, the opposite conclusion could be reached with at least equal facility. That is, if the starting point were section 2244(d) instead of section 2254(d), the Court might equally well conclude that the fact that section 2244(d) affords some flexibility to habeas petitioners means that section 2254(d) must embody a less rigid standard of review than Calderon posits. Petitioner Calderon offers no reason why its (strained) interpretation of the "deferential standard" in section 2254(d) should be deemed to shed light on the one-year limitation in section 2244(d), rather than the other way around.

its place a welter of illogic, mischaracterization, and rhetoric. The petition should be denied.

Dated: May 15, 1997

Respectfully submitted,

By: Richard Neuhoff (Kay K Schryver)

RICHARD C. NEUHOFF*
600 Harrison Street, Suite 535
San Francisco, CA 94107
(415) 543-0433
* Counsel of Record

CALIFORNIA APPELLATE PROJECT
KAREN S. SCHRYVER
1 Ecker Place, Suite 400
San Francisco, CA 94105
(415) 495-0500

Attorneys for Real Party in Interest Rodney G. Beeler